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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1186.

MADEIRENSE do BRASIL S/A,

Petitioner,

AGAINST

STULMAN-EMRICK LUMBER CO.,

Respondent.

BRIEF FOR RESPONDENT.

MURRY C. BECKER,
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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The petition concerns itself with no question of substantial interest. The decision of the Circuit Court of Appeals is not in any way in conflict with applicable decisions of this court or with the weight of authority. Petitioner, at the time the original motion was argued, had already waived its right to a jury trial and, therefore, had no right to have a jury assess damages nor did it by affidavit request a jury trial on the issue of damages or raise any controversial factual issue. The purported issues of fact now being urged were raised after the original motion for summary judgment had been decided and even then, the statements alluded to as indicating a factual

conflict are either absent from the record or are statements of counsel made for the first time in his affidavit on the motion for reargument, without counsel asserting that he had any personal knowledge of the facts or making any showing indicating that he might have had personal knowledge of the facts. The statements in the affidavit on the motion for reargument even if proper are therefore of no probative value.

The Opinions Below.

The United States District Court, Southern District of New York, handed down its opinion granting respondent motion for summary judgment and denying petitioner's cross-motion for summary judgment on December 20, 1943 (R. 149-151). Its opinion on petitioner's motion for reargument is dated February 7, 1944 (R. 170, 171). Both opinions are unreported. The opinion of the Circuit Court of Appeals, Second Circuit handed down on January 9, 1945 is reported at 147 F. 2d, 399 and is printed in the record at pages 185 to 202.

Statement.

Respondent, a lumber dealer at Brooklyn, New York, in October, 1940, ordered 450,000 square feet of Brazilian pine to be shipped by petitioner from Brazil to New York (R. 111-122). Brazilian Mineral and Timbers Corporation, a corporation with its offices in Manhattan, New York City (hereinafter referred to as Brazilian) solicited the order of respondent for petitioner's benefit and having obtained a commitment from respondent in terms acceptable to petitioner, communicated the commitment by cable and letter to petitioner and received its acceptance. This order was subsequently increased to 500,000 square feet of which 160,000 feet were kiln dried lumber at $40 per thousand, C. & F. New York, and 340,000 feet were

air dried lumber at $38.00 per thousand feet, C. & F. New York (R. 114, 117, 127). Payment was to be made by letter of credit for 90% of the FOB value, the balance of 10% after arrival of the shipment in New York and the freight charges estimated at $12 per thousand feet were to be paid in New York by respondent for petitioner's account and deducted from the total price. Although shipment was to be made immediately, petitioner delayed, and subsequently insisted that Brazilian procure from respondent an order for an additional 250,000 feet of air-dried lumber in order to make up an entire shipload and thus ensure delivery of the first 500,000 feet. The additional 250,000 feet of air-dried lumber was to be at $40 C. & F. New York to cover the increase of $2.00 per thousand square feet in the freight rate. Respondent in order to ensure delivery of the original 500,000 feet, ordered the additional 250,000 feet at the increased price (R. 62, 65, 66, 70, 72, 74, 77. 80, 81, 85, 90, 107, 128-132). The *modus operandi* followed by Brazilian was to procure informal commitments by letter, cable or orally between petitioner and respondent and to follow that up by procuring respondent's formal order on its order form and then by procuring petitioner's formal confirmation on Brazilian's order form. The formal orders upon which plaintiff relies appear from Exhibits 2 (R. 42, 43), 3 (R. 46), 13 (R. 56), 18 (R. 60), 25 (R. 72; 73). Respondent's order forms appear as Exhibits B (R. 112-114), D (R. 116, 117), M (R. 126, 127), N (R. 128, 129).

As each order was placed, respondent procured a letter of credit in favor of petitioner for 90% of the FOB value, the FOB value being ascertained by deducting from the total gross price the estimated cost of freight (R. 118-125, 131-143). When the freight rate increased, the amount of the letter of credit was reduced *pro tanto* in order to allow respondent to retain here a sum equal to the amount which would have to be paid to the steamship

company. It is incorrect to state that "Neither contract provided which party should bear the cost of any increase in the freight rate, * * *" (petition, p. 5), since these were C. & F. New York prices and the seller was committed to delivery at the contract price and to absorb any freight increase. It likewise would have had the benefit of any freight decrease. Both courts below have so found (R. p. 153; R. 189, 192, 193).

Petitioner's order form for the 500,000 feet provided that the lumber was to be "Clean lumber, *perfectly dry*, free from knots and from any other defects due to kiln drying or natural drying" (R. 43); for the 250,000 feet, "Clean lumber, *perfectly dried*, free from knots or any other defect" (R. 73). (Emphasis ours.) Both orders recited "Sold to: Stulman-Emrick Lumber Co. Inc., Brooklyn, New York". Respondent's order forms provided "All lumber shipped by vessel must be stowed below deck. * * * Stock must be thoroughly dry and well manufactured in every respect" (R. 116, 117, 128, 129).

Before shipping the 500,000 feet, petitioner sought to pass the increase on to respondent and when respondent refused to be liable therefor, petitioner acknowledged that under its contract, it was required to absorb the increase in freight rate, agreed to do so and requested respondent to change the letters of credit and reduce the amount thereof so that respondent could retain in New York City a sum equivalent to the aggregate freight charge at a freight rate of $16.98 per thousand feet (R. 58, 59, 63, 70, 71, 80-84, 93, 118-122, 131-143). On receipt of these corrected letters of credit, petitioner cabled that it could ship the 500,000 feet under deck but could only ship the 250,000 feet on deck and would only ship the 250,000 feet on deck "at buyer's responsibility any deterioration" (R. 84). Respondent, having refused to accept responsibility for deterioration of the lumber which petitioner proposed to ship on deck (R. 108), Brazilian cabled "PINE ON DECK ABSOLUTELY UNACCEPTABLE. SHIP

ONLY 2042 IN THE HOLD" (R. 84, 85). Had the lumber been shipped on deck, it would have completely deteriorated by the time it arrived here (R. 85, 88, 108). Petitioner thereafter refused to ship the 250,000 feet and requested Brazilian to procure respondent's consent to a cancellation of the commitment for this lumber, unless respondent would agree to purchase on an F.O.B. basis of $28 per thousand square feet and agree to pay the freight rate applicable at time of shipment, which freight rate was then quoted at $33.13 per thousand square feet (R. 86, 89, *et seq.*).

Neither party demanded a trial by jury and *petitioner's right to trial by jury as a matter of right has been waived* (Rule 38 [d] Rules of Civil Procedure). The moving affidavit of respondent's counsel asserted:

> "Mr. Ring, (petitioner's counsel) on June 4, 1943, told me that he intended trying this case on the correspondence; that he had no witnesses to produce other than the correspondence and the deposition of my client which he proposed to take as soon as issue was joined. No depositions have been taken in this case. It is my opinion from a study of the various documents contained in the demand and in the moving papers that the contentions of both parties can be fully and completely disposed of on the basis of these documents; that no oral testimony is required and that therefore, no trial is required" (R. 147).

This statement was not controverted. In fact, petitioner served no affidavit in opposition to respondent's moving papers when the motion for summary judgment was originally brought on. Instead, it served merely a cross-notice of motion for summary judgment reciting that petitioner was relying on respondent's moving papers (R. 148). Petitioner thereby adopted this statement. Further facts will be discussed under the respective point headings.

POINT I.

The question of damages was not in dispute at the time of the submission of the original motion for summary judgment. Even if it were in dispute, the result would necessarily have had to be the same.

On the original motion, petitioner gave no concern at all to the question of damages. It addressed itself solely to the question of liability. It was only after the motions had been decided adversely to petitioner that it sought by motion for reargument to have the court reconsider the question of damages, and even then its position was not that the parties were at issue on the question of damage, but merely that "plaintiff has made no statement of market value" (R. 164) and that " * * * defendant never paid the freight and has never sustained the damage" (R. 165; see also R. 172-176, 178).

The record before this court is barren of any assertion that petitioner desired an opportunity to cross-examine respondent's president on his statement of market value or was in any way in dispute with its own statement of market value. The majority opinion in the Circuit Court points out that "It seems not to be doubted that plaintiff has never had any intention of attacking its own figures; at the very least, there has certainly been no attempt, or even suggestion of an attempt, to 'condescend upon particulars' as the procedure requires" (R. 196). It also points out that there was no necessity for cross-examination of respondent's president since the District Court relied upon petitioner's admissions and not the statement of market value offered by respondent's president (R. 193-196).

As the record was presented to the District Court, it was established without dispute that petitioner had agreed to sell and deliver 250,000 feet of lumber at $40 per thou-

sand feet C. & F. New York or an entire price of $10,000; that petitioner had breached its agreement in January, 1941 and that the breach was completed by January 31, 1941 (R. 171) and that in January, 1941, and thereafter, petitioner made statements as follows: The freight rate was $33.13 per one thousand sq. ft. and "Our FOB price is on the basis of $28 per one thousand sq. ft." (on January 9, 1941) (R. 86). Ferreira, petitioner's president, wrote Alvarez of Brazilian on the same date to the same effect (R. 88, 89). On January 22, 1941, it wrote "Regarding the 250,000 feet, please proceed in accordance with our letter of January 9 as the Lloyd continues for the meantime to maintain the freight rate of $15 per 40 cubic feet * * * " (R. 94). [This is equivalent to $33.13 per one thousand sq. ft. (R. 86)]. To the same effect see Exhibit 43, item 4 (R. 95) dated January 23, 1941 and Exhibit 48 (R. 101) at folios 302, 303, wherein petitioner refers to two other firms who shipped on a basis of a freight rate of $33.13 per thousand sq. ft. or $15 per 40 cubic feet. These were admissions against interest,—one of the highest forms of proof available in law. True, the statements were not conclusive. Petitioner might have submitted an affidavit in which it offered an explanation thereof; but no such offer was made. If it intended to contest any factual issue it should have presented in affidavit form facts showing that there was a substantial issue. Its failure so to do warranted the court in accepting as true respondent's affidavits and the admissions contained in the various letters (*Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469; *Geller* v. *Transamerica Corp.*, 53 F. Supp. 625; *Rudolph* v. *John Hancock Mutual Life Insurance Co.*, 251 N. Y. 208, 213).

See also *Harrison* v. *United States*, 42 F. 2d 736, where the court at page 737 stated of such an admission:

> "Since appellant was a party to the action, this statement not only impeached him but it constituted

substantive evidence against him. Jones Commentaries on Evidence (6th Ed.) §§2412, 2414."

The Circuit Court said "That this was a definite and clear-cut admission, made at or about the time of the breach, seems clear" (R. 195). With this proof, and nothing to contradict it, how can it be said that there was an issue of fact as to market value or as to the item of damage. (*Fox* v. *Johnson Winsatt Inc.*, 127 F. 2d 729; Shientag, *J.*, 4 Fordham Law Review, 180, 208, 209.)

Petitioner's assertion that it might be found that there was evidence in the record that the market price of lumber at the time of the breach was less than the figure determined by the District Court is without foundation for: (a) The statement referred to in the November 28, 1940 letter from Brazilian (item 3, p. 14, Petitioner's brief) has no probative value since it was a statement made by one not a party to the action, was obviously based on hearsay (*Boerner* v. *U. S.*, 26 F. Supp. 769) and was anywheres from six weeks to two months before the date of the breach; (b) The statement (item 4, p. 14, Petitioner's brief) in the letter of January 9, 1941 from petitioner's president to Alvarez, if it were a statement of market value would be a self-serving declaration. Actually, it merely expresses an inability to understand how a competitor was able to sell lumber with a freight rate of $33.13 per thousand feet. (c) The statement in Alvarez's letter of January 16, 1941 (Item 5, at p. 15 of Petitioner's brief) was made by one not a party, is not binding on respondent and again merely expresses incredibility that the freight rate had gone up so much. The fact remains that the freight rate did go up to $33.13 per thousand square feet and nobody disputes that.

However, assuming that all of these statements referred to at pages 14 and 16 of petitioner's brief had some probative value, the ruling must necessarily have been the

same. Petitioner has waived its right to a jury trial here, a fact undoubtedly overlooked by the learned dissenting Judge below. The court was not obliged to impanel a jury to assess damages. The exception in Rule 56 (c) Rules of Civil Procedure, applies only where a jury has been demanded and the party has an absolute right to have the jury pass upon damages in dispute, or else where the court of its own volition impanels a jury to aid it in determining the issue of damage (Rule 39 [b] [c], Rules of Civil Procedure). Petitioner made no request on the original motion for a jury trial on the question of damages. At that time it was content to adopt the statement contained in our moving affidavit (R. 147) that the correspondence constituted the full proof on both sides. The District Court had the right to assume that counsel for both parties had submitted to the court all proof available or which they deemed necessary.

The District Court was, therefore, in the same situation as if there had been a trial before it without a jury and both parties had rested and moved for judgment.

In *Harrison* v. *United States, supra,* where the plaintiff sought to recover disability benefits, the government offered in evidence a "Declaration of Soldier" in which he answered "No" to the inquiry as to whether on a certain day he was suffering from the effects of any wound, injury or disease. The court pointing out that he made no attempt to explain such statement, stated that his claim of disability was in irreconcilable conflict with the statement in the "Declaration of Soldier" offered by the defendant and stated at page 737:

> "It follows that the findings of the trial judge were supported by substantial evidence. In an action at law, alleged errors in the findings of the trial court are not reviewable here, when such findings are supported by substantial evidence. *Dooley*

v. *Pease*, 180 U. S. 126, 131, 132, 21 S. Ct. 329, 45 L. Ed. 457; *Howbert* v. *Penrose* (C. C. A. 10) 38 F. (2d) 577, 578; *Wabash Ry. Co.* v. *So. Daviess County Drainage Dist.* (C. C. A. 8) 12 F. (2d) 909, 913, 914. In the trial of an action at law without a jury, the decision of a court upon the weight of conflicting evidence is not reviewable on appeal. *Busch* v. *Stromberg-Carlson Tel. Mfg. Co.* (C. C. A. 8) 217 F. 328, 330; *People's Bank* v. *International Finance Corp.* (C. C. A. 4) 30 F. (2d) 46, 47; *Phoenix Ins. Co.* v. *Bakovic* (C. C. A. 9) 2 F. (2d) 857, *Lehigh Valley R.R. Co.* v. *State of Russia* (C. C. A. 2) 21 F. (2d) 406, 408."

Sartor v. *Arkansas Natural Gas Company*, 321 U. S. 620, is not at all in conflict with the ruling below. If it were, the court could never assess damages on a motion for summary judgment without a jury. In the *Sartor* case, there had been several trials and various other proceedings. The issue was whether the market value of gas was in excess of 3¢ per one thousand cubic feet. The defendant had paid 3¢ for a number of years and suit was brought to recover the difference between the amount paid and received and the alleged market value. The evidence offered on market value was solely that of officers of the defendant or others whose interest with respect to the subject matter of the litigation were similar to that of the defendant, all of whom had given like testimony at a previous trial of the case wherein a jury had found contrary to their testimony. There, the issue of market value was dependent on statements of the moving party. Here, it was dependent on statements of the opposing party; which statements by their adoption on the cross motion were reiterated. In the *Sartor* case, this court held that opinion evidence of that nature "where the undisputed facts leave the existence of a cause of action depending upon ques-

tions of damage * * * " should not be accepted summarily, but that a jury should pass on the issue. Presumably, the parties had a right to a trial by jury. Here, the existence of the cause of action does not depend on the question of damage. Here, even if defendant established no damage, it would be entitled to a judgment adjudicating the breach of contract and an award of nominal damage. But what is more important is that the evidence in this record is such that even if there were a jury trial, a jury would not be at liberty to disbelieve the evidence which the court has believed and in fact, the District Court would have been required to direct a verdict. The Circuit Court so found (R. 196. 197).

The assertion that we have not sustained the burden of proving our damages is answered by the authorities cited at page 193 of the record. Whether the point of delivery be New York or Brazil is immaterial. The result is the same.

POINT II.

Respondent did not admit that there was any balance due the petitioner.

The theory of petitioner's Point II based upon the incorrect assertion at page 7 of its petition that the balance of 10% was admittedly due is entirely fallacious. Respondent by denials placed in issue the allegations of the complaint except insofar as it admitted that it had only paid $18,201 on account of the 500,000 feet of lumber shipped (Answer, paragraph 11, R. 9, 10). It urged technical defenses in law in defeat of plaintiff's cause of action (R. 6, 7, 10) which for the purposes of the summary judgment motion the District Court side-stepped (R. 151, 152) and it urged that plaintiff had failed to completely perform its contract—a condition precedent to recovery,

in that the contract was an entire contract for 750,000 feet, only part of which had been shipped (R. 10, 151). It was on that theory that respondent consented to offset the amount of $1,078.98 against its recovery (R. 173). The briefs in both courts below show that respondent militantly took that position. The District Court found that the contract provided for the delivery of a total of 750,000 feet (R. 152, 153) although the Circuit Court in its opinion spoke of two contracts as if each order were a separate contract.

Furthermore, while the court is given discretion to award summary judgment on a cause of action alleged in a complaint prior to the final determination of issues raised by a counterclaim, there is only one case that we are able to find (*Seagram-Distillers Corporation* v. *Manas*, 25 Fed. Supp. 233), where that was done; and in that case, it was obvious that the defendant never intended to try its counterclaim. Even there, the court required the plaintiff to furnish a bond conditioned for the payment of any damage the defendant might sustain by reason of the prior enforcement of the plaintiff's judgment. In the New York State courts, it has been held that the existence of a counterclaim is in itself sufficient to defeat an application for summary judgment. *Treacy* v. *Melrose Paper Stock Co.*, 269 N. Y. 155; *Dietz* v. *Glynne*, 221 App. Div. 329; *Aetna Life Insurance Co.* v. *National Drydock and Repair Co., Inc.*, 230 App. Div. 486, *Plaut* v. *Plaut*, 255 App. Div. 375.

POINT III.

Respondent contracted on the basis of the language of its order forms (Exhibits "B", "D", "M", and "N" [pages 112-14, 116-17, 126-7, 128-9]). Petitioner, by accepting the letters of credit furnished by the respondent, undertook to be bound thereby (Exhibits "F", "L", "T", "X", "Y" [pages 119-20, 125, 136-7, 141-2, 142-3]). Actually, it matters not whether respondent's order forms or petitioner's order forms or both sets of forms are used as the basis for the contract. There was a clear breach which petitioner recognized as such.

Clearly with knowledge of the fact that Brazilian was practically out of business, petitioner, in framing its complaint, elected to allege that its contract was with both defendants. Then recognizing the possibility that respondent might counterclaim against Brazilian and petitioner or solely against Brazilian, and that Brazilian might plead over against petitioner, it voluntarily dismissed its complaint as to Brazilian. Thus, the effect of its present pleading is that petitioner alleges that it has contracted with respondent. If it contracted with respondent it could only be on the theory that Brazilian was petitioner's agent. There must have been mutuality of contract. Concededly, there were order forms and correspondence executed and transmitted by and between petitioner and Brazilian and a separate set of order forms and correspondence executed and transmitted by and between respondent and Brazilian. While it is true that there is no evidence in the record that order number 2330 was physically transmitted or exhibited by Brazilian to petitioner, the record is replete with evidence that the contents of order number 2330 were communicated and transmitted to petitioner. The District Court found that Brazilian was petitioner's agent. That finding has necessarily been affirmed by the Circuit Court's

order for mandate even though the Circuit Court in its opinion did not specifically rule on the finding. Since there was substantive evidence to support it, it is not reviewable here.

The District Court also found that at all events, petitioner by bringing this action on the grounds alleged had foreclosed itself from asserting that Brazilian was not its agent (R. 154). The enumeration at the bottom of page 19 and top of page 20 of petitioner's brief is not the only evidence bearing on the legal relationship of Brazilian to the parties. There is much aside from the form of the complaint to substantiate the District Court's finding that Brazilian was petitioner's agent and that it ratified Brazilian's acts.

The entire import of Exhibits 1 to 48 indicates that Brazilian was acting for and on behalf of petitioner. In Exhibit 29, petitioner requests of Brazilian "that in the future, you will do everything possible in order to minimize this loss of ours by selling our product at a price which is more compensating for us" (R. 81). In Exhibit 31 (R. 83) petitioner requested Brazilian to have respondent change the credits so as to reduce the amount of the letters of credit and allow for retention at New York of a sum sufficient to pay freight at the rate of $16.98. See also Exhibit W (R. 140), Exhibit 38 (R. 90), Exhibit 46 (R. 98, 99) Exhibit 47 (R. 99, 100), Exhibit 48 (R. 100, 101).

The order forms on which petitioner relies specify respondent as the purchaser. Respondent's order, although in form addressed to Brazilian, was clearly an order for the sale of lumber by petitioner to respondent and for the purchase of the lumber by respondent. Respondent was not agreeing to pay Brazilian for the lumber. All Brazilian was to get was a commission. Payment was to be made to petitioner who was to receive a letter of credit and the letter of credit was actually drawn in its favor. The entire chain of correspondence

indicates that where any discretion or authority was delegated to Brazilian, it was delegated by petitioner to Brazilian, not by respondent, nor does the fact that we were enabled to obtain Brazilian's files indicate any agency relationship between Brazilian and respondent. The files were obtained by respondent's counsel from Brazilian's counsel after the suit had been commenced (R. 145, 146). Either Brazilian was petitioner's agent or it was merely a middle-man and nobody's agent. If there were two separate contracts, one between petitioner and Brazilian, and the other between Brazilian and respondent, then the situation would be as follows: Either Brazilian as agent for petitioner made a contract with respondent which is mutually binding upon petitioner and respondent (as the District Court found—and necessarily so, since petitioner accepted respondent's letters of credit issued only in pursuance of respondent's orders); or it was not the agent and in such event, respondent is not bound by orders numbered 2042 and 2049. Petitioner, nevertheless, on elementary principles of contract law established as far back as *Lawrence* v. *Fox* (20 N. Y. 468) and ever since followed, would be still liable to respondent for performance of orders numbered 2042 and 2049. Otherwise, why allege, in its complaint, the failure to perform 2049 and an excuse therefor?

Such being the case, it matters not whether the contract provision was that lumber had to be stowed below deck. It does matter that petitioner was required to deliver "Clean lumber, perfectly dry" (R. 43, 73). It is undisputed on this record that if the lumber were shipped on deck, it would completely deteriorate (R. 85, 108). (Note also Ferriera's tacit acknowledgment of this at page 88 of the record). Petitioner recognized that fact when it sent its cable of January 8, 1941, Exhibit 33 (R. 84) stating that it would ship the 250,000 feet on deck "at buyer's responsibility any deterioration". If peti-

tioner had the absolute right to ship on deck, it would have shipped the lumber without sending this cable. It recognized that it did not have such right, that deterioration was inevitable and that it was obligated to ship the 250,000 feet in the same manner as it was obligated to ship the 500,000 feet. (In fact it was willing to do so if respondent would pay the increased freight rate [R. 86, 89, 94].) The sending of this cable was a practical construction by petitioner, of its contractual obligation, which is entitled to great weight if not almost conclusive as to the meaning of the contract. *Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273, *Nicoll* v. *Sands,* 131 N. Y. 19, 24. When we bear in mind that there was specific reference to air-dried lumber and kiln-dried lumber and that a premium was being paid for kiln-dried lumber, it is obvious that it went to the essence of the agreement that the lumber be perfectly dry and that the conjecture which petitioner requests this court to indulge in by way of judicial notice (bottom of page 20, top of page 21, petitioner's brief) is entirely unwarranted.

The statement that petitioner tendered the 250,000 feet of lumber to a carrier is not warranted by anything in the record. The Circuit Court expressly so found (R. 191). The learned Circuit Court embarked upon an extended analysis of the term FOB in giving consideration below to petitioner's assertion that it had made a proper tender in Brazil. But the analysis was unnecessary since this was not an FOB contract, it was a C. & F. New York contract. The term FOB was used solely for the purpose of ascertaining the amount which would have to be paid to petitioner after the freight charges had been deducted from the gross price in order that the final figure payable to petitioner might be ascertained and a letter of credit for 90% thereof issued. The fact remains as the Circuit Court found that petitioner's obligation was to place on board ship at Brazil 250,000 feet of lumber under such a shipping contract as would reasonably assure the transportation of this lumber under conditions such that bar-

ring an untoward event, the lumber would arrive in New York clean and perfectly dry. It never did that. It offered to deliver the lumber to a carrier to be transported on deck, provided respondent would assume responsibility for deterioration. That was a breach of contract whether the contract be respondent's order forms, petitioner's order forms or whether it be spelled out of both sets of order forms and the correspondence.

In fact, originally, petitioner, instead of claiming tender of performance, asserted that performance had been excused by either cancellation or non-availability of a boat (R. 4, 5); and as late as June 18th, 1943, was unable to make up its mind as to which of the latter it would assign as its excuse for nonperformance (R. 26).

Conclusion.

No substantial question of law is presented for review. The application for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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